No. 14462

In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPORATION,
Appellant,
vs.
TUCSON AIRPORT AUTHORITY,
Appellee.

Petition for Rehearing

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Comes now the appellee, Tucson Airport Authority, and respectfully petitions the Court to grant it a rehearing in the above captioned and numbered cause, upon the following grounds:

1. The Court in its majority opinion erroneously applied the "single and isolated" rule to the facts of this case, notwithstanding the fact that the undisputed evidence clearly indicated the commencement and continuance for more than two years of a course of business, during all of which time the appellant Worcester Felt Pad Corporation failed to comply with the provisions of Sec. 53-801 A.C.A. 1939 Ed., 1952 Cum. Supp.

2. The Court in its majority opinion has disregarded the clear, unambiguous and repeated pronouncements of the legislature of the State of Arizona that:

> "Every act done by said corporation prior thereto (complying with 53-801) shall be void",

and by its opinion construes the statute to mean that instead of every act, the legislature meant that the first or second, or, in the words of the majority opinion, the preliminary acts, are not to be considered void.

3. The majority opinion also states, at page 8, the following:

> "He (Schmidt) admitted he had received a $2,000 salary increase 'out of this'."

This statement is incorrect and is not found expressly or by inference in the record of this case and should not be permitted to remain in the opinion of the Court.

I.

Each of the Arizona cases cited by the majority of the Court in support of its conclusion involved a fact situation where a foreign corporation performed one act—and only one act—within the State of Arizona. Some of the Arizona cases cited in the majority opinion in fact involve transactions that were consummated completely outside the State of Arizona. In these cases, the only thing done in Arizona involved litigation.

In contrast to the cases upon which the majority of the Court has relied, the present case involved a fact situation in which a Massachusetts corporation, through its officers, came to Arizona in January of 1949, and entered into negotiations looking toward the lease of property in Arizona. This could well be, and should be, considered as act number one by the Massachusetts corporation in Arizona. These negotiations culminated in act number two—the execution within the State of Arizona on March 1, 1949 of a lease of certain premises for a period of three years, with options to extend the lease further. This lease had a right of appellant to sublet. The appellant's evidence considered most favorably toward it was that it either intended to operate the premises in furtherance of its own business, or to sublet the premises, whichever would be most profitable. There can be no doubt that in entering upon the negotiations and in executing the lease, the appellant was doing so for the purpose of attempting to make a profit out of the leased premises. It was never suggested by anyone that the appellant did not intend to exercise control over the premises described in the lease or to assert the ownership of whatever rights might accrue to it by virtue of that lease.

It is true that there has not as of this date been a ruling by the Supreme Court of Arizona upon the precise question presented by this appeal, insofar as it relates to foreign corporations. However, the Arizona Supreme Court, in *Woodward vs. Fox West Coast*

Theaters, 36 Ariz. 251, 284 Pac. 350, by implication indicated that if a foreign corporation was not qualified to do business in Arizona at the time it executed a lease agreement on Arizona property, such lease would be void as prescribed by 53-801 A.C.A. 1939 Ed. The Supreme Court in this case stated that since the theater company had qualified *prior* to actual execution of the lease, the lease was valid. The only fair and reasonable deduction to be drawn from the language in that case is that had the theater company not been qualified as of the date of the execution of the lease, the lease would have been void, all in accordance with the express language of the statute.

This Court in its majority opinion has stated that it does not feel that the case *National Union Indemnity Co. vs. Bruce Bros.,* 44 Ariz. 454, 38 Pac. 648, is controlling. In that case, the contract sued upon by Bruce Bros. was not an initial act done by the foreign corporation. The initial act done by the foreign corporation was the making of a contract with the State of Arizona. In the langage contained in the opinion, Bruce Bros. "shortly thereafter" entered into the contract which was the subject of the lawsuit. From the opinion, we must conclude that at best the contract involved in the *Bruce Bros.* case, supra, was the second formal contract entered into by it within the State of Arizona. Thereafter, according to the opinion, Bruce Bros. carried on an extensive activity within the State of Arizona. Likewise in our case, after the execution

of the lease, the appellant carried on an extensive activity within the state.

The majority of the Court has misinterpreted the language of the Arizona Supreme Court, indicating that in order to come within the foreign corporation statute "a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business and not merely a single act." The majority construes this to mean that until a substantial part of its business is being done in Arizona, or until its business is a durable one of some permanence, anything done by a foreign corporation prior to qualifying is valid. It is respectfully submitted that neither the Arizona Supreme Court nor the Arizona legislature intended its statutes to be so construed.

The evidence is undisputed in this case that the appellant did engage in Arizona in an enterprise of some permanence and durability and did transact within the state a substantial portion of its ordinary business as opposed to the single act of entering into a lease and nothing more.

The majority opinion disregards the language of the Arizona Supreme Court in the *Bruce Bros.* case, supra, as follows:

> "The legislature has repeatedly and solemnly declared that any and all of the acts of the corporation are 'void' without qualification or exception of any nature."

In *Pennsylvania Company for Insurance of Lives and Granting Annuities, et al. vs. Bauerle,* (Ill.), 33 N.E. 166, a Pennsylvania corporation had received a gift of property located in Illinois. After receipt of this gift it entered into a contract in Illinois to sell the property, and upon breach of the agreement of sale, the Pennsylvania corporation sued for specific performance. The Pennsylvania corporation had never qualified to do business in the State of Illinois. In declaring the contract of sale to be void and unenforceable because of an Illinois statute similar to the Arizona statute, the Illinois court said as follows:

> "So here receiving the land adjoining Chicago by devise, with power to sell and dispose of the same, and the power to lease it, and to collect the rents and profits therefrom, and the assertion in this state of the ownership of said land, and assuming to sell and convey it, and bringing suits in the courts of this state in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to the same, must be held to be doing business in this state within the purview of said section."

In *Cassidy's, Ltd. vs. Rowan, et al.,* 163 N.Y.S. 1079, a foreign corporation had leased premises in New York and thereafter had subleased the premises. The foreign corporation had never qualified to do business in New York. When it filed suit to collect past due rent from one of its subtenants, the Court held that it was barred from doing so since its acts in subleasing por-

tions of its leased premises constituted doing of business in New York state and since it had not qualified to do business, the subleases were void.

The Supreme Court of Oregon, in *Weiser Land Co. vs. Bohrer,* 152 Pac. 869, in a suit to compel specific performance, held that an Idaho corporation which purchased land in Oregon, gave a mortgage on it, leased it, etc., was doing business in Oregon. Since it had not qualified in accordance with Oregon statutes, the Court refused to compel performance of the covenant upon which the suit was based. The covenant was contained in a mortgage made simultaneously with the contract by which the Idaho corporation acquired the Oregon property.

The Court of Appeals for the 7th Circuit, in *In re Bell Lumber Co.,* 149 F. 2d 980, held that a foreign corporation by contracting to furnish a Wisconsin lumber company plans, designs and services for houses to be prefabricated by the lumber company, was doing business in Wisconsin in violation of the state statute, and hence its contract with the Wisconsin corporation was unenforceable. The contract in this case was the first act. It was a preliminary act.

The appellate court of Indiana in *Lowenmeyer vs. National Lumber Co.,* 125 N.E. 67, had before it a contract by a foreign corporation for the purchase of real estate, which contract was made prior to the foreign corporation's having complied with the Indiana statutes governing such corporations. In an action by the

seller to enforce specific performance of the contract, the Indiana court stated as follows:

> "In the instant case, however, it is evident that the act of purchasing the real estate in question does not fall within that class of cases designated isolated transactions. . . . A special finding of facts shows that the foreign corporation in question had the power to acquire and hold such real estate as might be necessary to carry on its business of dealing in coal and fuel, and it can not be said with reason that the act of acquiring a place for the conduct of such business, under the facts found, although in a sense preliminary, did not fall within the inhibition of the statute."

The same fact situation present in the *Lowenmeyer vs. National Lumber Co.* case, supra, is present here. In this case the appellant obtained a lease on premises either for the purpose of conducting a portion of its regular business, or for subleasing the premises to either one of its subsidiary corporations or to another subtenant. In any event, the purpose of the original lease was to enable the appellant to make a profit from the use of the premises.

In *Greene vs. Kentenia Corp.,* (Ky.), 194 S.W. 820, the Kentucky court of appeals held that a foreign corporation which invested its money in timber and mineral lands without attempting to develop them, and which merely held the property as an investment, was doing business within the state. The Kentucky court stated:

> "To employ capital by investing it in land and not using the land is, again, to our view, doing business within the sense of that term as used in the statute providing for the tax sought to be enjoined."

In *Larkin vs. Commonwealth,* (Ky.), 189 S.W. 3, the Kentucky court, in defining "doing business", stated:

> "In other words, business does not mean dry goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business."

One of the senior U. S. District Judges sitting in the U. S. District Court of the District of Montana, Chief Judge Pray, in *Hutterian Brethren of Wolf Creek, as a Church of Sterling, Alberta, Canada, vs. Haas, et al.,* 116 F. Supp. 37, had before him an action in which a Canadian corporation brought a suit against the vendors of real estate for specific performance of a contract between the vendors and the corporation's agent for the sale of real estate. Chief Judge Pray held that the contract was void because of failure of the Canadian corporation to comply with the statutes dealing with foreign corporations doing business in the State of Montana. In this case the Canadian corporation actually had complied with the Montana statutes prior to the time that the litigation was commenced, and its counsel urged that that was sufficient. Nonetheless, Judge Pray refused to "emasculate" and "con-

tradict" the clear language of the Montana statute. In our case, the Massachusetts corporation had not even bothered to comply with the Arizona statutes at the time of trial of this case, almost five years after the lease in question was executed.

In this case, the appellant by the majority opinion of the Court has been permitted to do business in the State of Arizona upon more favorable terms than a domestic corportion could do business. This is prohibited by the Constitution of the State of Arizona, which in Article XIV, Section 5, provides:

> "No corporation organized outside of the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this state; . . . ."

Section 53-901 A.C.A. 1939 Ed., requires every corporation doing business in Arizona to pay an annual fee and to make an annual report. This obviously has never been done by the appellant and notwithstanding that, the appellant in this case is being given the same privileges as a domestic corporation which faithfully complies with Arizona statutes.

Also of interest to this question are the following:

John Hancock Mut. Life Ins. Co. vs. Girard (Idaho), 64 P. 2d 254;

Davis vs. U. S. Shoe Repairing Machine Co. (Tex.), 92 S.W. (2) 1107; and

Cadden-Allen, Inc. vs. Trans-Lux News Sign Corp. (Ala.), 48 So. (2d) 428.

II.

Section 53-802 ACA 1939 Ed. provides:

> "No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, and every act done by said corporation prior thereto shall be void."

There is nothing ambiguous about the foregoing section. It does not purport to say, and by no stretch of the imagination does it intimate, that the first or the second, the tenth or twentieth act of a corporation before complying with the Arizona statutes, shall be valid. It simply states that all acts, whether No. 1 or No. 100, are void.

Judge Lockwood, speaking for the Arizona Supreme Court, in *National Union Indemnity Co. vs. Bruce Brothers,* supra, stated,

> "But under a statute such as ours, there is no room for construction. The Legislature has repeatedly and solemnly declared that any and all the acts of the corporation are 'void', without qualification or exception of any nature."

Section 53-803 ACA 1939, provides that if any agent of a foreign corporation is absent from the county for a specified time,

> "then the right to transact business by the corporation in the county represented by such agent shall cease, and all acts or contracts performed or

made in said county thereafter shall, at the option of any person interested, be null and void."

It seems beyond argument that if the statutory agent appointed by a qualified foreign corporation should absent himself from the county for a period of three months without a successor agent being appointed, such absence should render void any contracts made by the corporation thereafter. Certainly any contracts made by a foreign corporation before appointing an agent are likewise null and void.

The effect of the majority opinion of the Court may be compared to a statement that the first time a person, contrary to statute, operates a motor vehicle without an operator's license, it does not constitute a criminal offense. Likewise, the ruling would indicate that a person could sell liquor one time without a license in the State of Arizona without violating the express provisions of the law. By analogy, the examples that might logically follow from the construction given the Arizona statute by the majority of the Court would run *ad infinitum*.

An opinion of any appellate court which purports to construe a statute should do so in such manner as to serve as a guide for the future. The opinion of the majority in construing Section 53-802 ACA 1939 Ed. does not do this. It furnishes no yardstick for counsel or parties for future guidance. It simply indicates that some act or acts of a foreign corporation prior to

qualifying will be held valid and enforceable. It leaves to conjecture which acts—the first, second or which—will be valid and enforceable. It does not explain how, when the Legislature used the words "every act", this Court determines the true intention of the Legislature and the meaning of such words were that they would apply only to some acts done sometime after the first act.

If the intent of the Legislature had been as indicated by the majority of the Court, it would have been ridiculously simple for the Legislature to state that the foreign corporation was entitled to do certain acts before being required to qualify. The Legislature did not see fit to grant such privilege, but the majority opinion of the Court does.

CONCLUSION

In conclusion, appellee, Tucson Airport Authority, for all of the reasons heretofore stated, urges that its Petition for Rehearing be granted, that upon rehearing, the judgment of the Court dated February 23, 1956, be vacated, and that judgment be entered affirming the judgment of the Hon. James A. Walsh, District Judge of the United States District Court for the District of Arizona.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, RICHARD B. EVANS, one of the attorneys for appellee, Tucson Airport Authority, do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

DATED March ....., 1956.

/s/ RICHARD B. EVANS